COURT OF APPEALS
DECISION
DATED AND RELEASED

February 5, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1086

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MELISSA GARCIA and
RODOLFO GARCIA,

Plaintiffs-Respondents,

v.

DUAINE C. STILLMAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Calumet County: STEVEN W. WEINKE, Judge. *Affirmed*.

NETTESHEIM, J. Duaine C. Stillman appeals from a small claims judgment in favor of Melissa and Rodolfo Garcia. In the trial court, both parties appeared pro se. On appeal, Stillman appears by counsel. However, the Garcias have not appeared on this appeal and have failed to file a respondent's brief.

The appellate issue is whether the judgment must be reversed and the cause remanded for a new trial because the trial court failed to take sworn testimony at the trial. We hold that the issue is waived because Stillman did not object to the court's oversight in failing to place the "witnesses" under oath.

The procedural history of this case is undisputed. Pro se, the Garcias commenced this small claims action seeking a return of their security deposit. Stillman failed to appear on the return date and a default judgment was entered against him. Later, Stillman wrote to the trial court asking that the matter be reopened. The trial court granted this request. This ruling was made by the Honorable Donald J. Poppy. Later, Judge Poppy also conducted a pretrial hearing in the matter.

The matter came on for trial on February 27, 1996, before the Honorable Steven W. Weinke. Melissa Garcia appeared pro se on behalf of the plaintiffs.[1] Stillman appeared pro se on his own behalf as the defendant. Judge Weinke opened the proceedings by reviewing the procedural history of the case with the parties. The judge then confirmed that Stillman had received a copy of the summons and complaint.[2]

Judge Weinke then turned to the merits of the case by reviewing the historical facts with the parties. Through this exchange, the judge learned that the disputed issue was whether Stillman had provided the Garcias with the

[1] The other plaintiff, Rodolfo Garcia, did not personally attend the trial.

[2] Apparently the judgment had previously been reopened because Stillman had not received a copy of the pleadings.

requisite notice that he was claiming an offset against the security deposit for alleged damage to the rental property. This exchange then led Judge Weinke and the parties into an informal, but orderly, discussion of each party's recollections on these matters. Unfortunately, before this colloquy began, the judge forgot to place Melissa and Stillman under oath. Neither of the parties, most notably Stillman, objected to this failing. After completing this dialogue with the parties, Judge Weinke made various findings of fact and conclusions of law, and awarded judgment in favor of the Garcias.

Later, the Garcias filed a contempt motion against Stillman for his alleged failure to provide relevant financial information. Again, Melissa appeared pro se.[3] Stillman appeared with counsel. Judge Poppy presided at the hearing on this motion. This proceeding was devoted to the contempt issue and Stillman did not raise any challenge to the procedures at the trial before Judge Weinke. Stillman then took the instant appeal.

Stillman relies on § 906.03(1), STATS., which provides:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so.

Since this statute was not followed, Stillman contends that a new trial is necessary.

[3] Again, Rodolfo did not appear.

This rule recited in the statute, however, is not ironclad. Other courts have held that the irregular administration of an oath to a witness, *or the taking of testimony without an oath at all*, must, if known to the adverse party, be objected to at the time. ***United States v. Odom***, 736 F.2d 104, 115 (4th Cir. 1984). A party may not permit the trial to proceed in the face of such irregularity and then raise the question after the trial. ***Id***.

Here, Stillman did not object to Judge Weinke's failure to place him and Melissa under oath. Stillman has therefore waived the judicial oversight.[4]

Moreover, the oversight in this case does not appear to have affected the integrity of the proceedings before Judge Weinke in any fashion. The judge carefully explored the procedural history of the case with the parties and assured that Stillman understood the nature of the Garcias' claim. The judge reviewed the facts of the case with the parties to assure that both the court and the parties understood the core issue in the case. The dialogue between the judge and the parties about the substantive issue was informative, orderly and thorough. This colloquy included references to certain correspondence and the marking of exhibits.

[4] We also note that once Stillman obtained counsel and appeared for further proceedings in the trial court, he still failed to raise the issue in the trial court. We acknowledge that if he had done so, Stillman would still have had to overcome waiver since the party must object at trial. Nonetheless, if Stillman had raised the issue posttrial, the trial court could perhaps have addressed any interests of justice considerations which might have stemmed from the oversight.

Informality in small claims proceedings is not uncommon and, perhaps, is to be encouraged when the litigants are pro se. Given that state of affairs in this case, the judicial failure to place the "witnesses" under oath was unfortunate, but an understandable oversight on the part of all concerned.

Finally, we observe that Stillman raises no challenge to the fairness of the proceedings or to the factual and legal determinations made by Judge Weinke. Our independent review of the record reveals no error by the judge. Nor do we harbor any lack of confidence in the fairness of the proceedings or in the result.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.